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# In the Supreme Court of the United States

OCTOBER TERM, 1974

HAROLD FRANKS AND JOHNNIE LEE, PETITIONERS

*v.*

BOWMAN TRANSPORTATION COMPANY, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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# INDEX


| | Page |
|---|---|
| Question presented | 1 |
| Interest of the amici curiae | 1 |
| Statement | 3 |
| Summary of argument | 6 |
| Argument: | |
| I. Under Title VII of the Civil Rights Act of 1964, district courts have power to award retroactive seniority credit to the identifiable victims of unlawful hiring discrimination in order to restore them to the situation they would have been in but for the discrimination | 9 |
| A. The remedial policy of the Act—to remedy the effects of past employment discrimination by making the victims whole as far as possible—comprehends awards of retroactive seniority to qualified persons who were wrongfully denied employment on account of their race | 9 |
| B. Section 703(h) of the Act is not a bar to an award of seniority credit | 14 |
| C. Retroactive seniority may properly be awarded to class members who previously were denied employment on account of their race, whether or not they filed individual charges with the Equal Employment Opportunity Commission | 20 |




579-037—75——1

Argument—Continued
II. The denial of seniority credit in this case cannot be sustained as a proper exercise of the district court's remedial discretion... 22
Conclusion... 29

CITATIONS

Cases:

*Atlantic Maintenance Co.*, 134 NLRB 1328, enforced, 305 F. 2d 604... 14
*Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711... 10
*Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870... 10
*Hecht Co.* v. *Bowles*, 321 U.S. 321... 24
*Humphrey* v. *Moore*, 375 U.S. 335... 12
*Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364... 10
*Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038, vacated and remanded on other grounds, 414 U.S. 970... 15
*Lamar Creamery Co.*, 115 NLRB 1113, enforced, 246 F. 2d 8... 14
*Local 189, United Papermakers* and *Paperworkers* v. *United States*, 416 F. 2d 980... 18, 19
*Louisiana* v. *United States*, 380 U.S. 145... 12, 24
*Meadows* v. *Ford Motor Co.*, 510 F. 2d 939, pending on petition for a writ of certiorari *sub nom. Local 862, International Union, United Automobile Workers* v. *Ford Motor Co.*, No. 74–1349... 15, 25
*Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288... 11
*Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400... 25
*Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211... 10



Cases—Continued

*Porter* v. *Warner Holding Co.*, 328 U.S. 395... 12
*Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505... 13
*Robinson* v. *Lorillard Corp.*, 444 F. 2d 791... 10
*Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90... 10
*Southern Electrical & Pipefitting Corp.*, 131 NLRB, 44... 14
*Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, certiorari denied, 404 U.S. 991... 10
*United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652... 26
*United States* v. *Burr*, 25 Fed. Cas. 30... 24
*United States* v. *Georgia Power Co.*, 474 F. 2d 906, parties agreed to order on remand, 7 EPD ¶ 9167... 2, 10, 14
*United States* v. *Navajo Freight Line, Inc.*, C.A. No. 72–116–MML (C.D. Cal.), supplemental order to consent decree entered January 15, 1973... 2
*United States* v. *Pilot Freight Carriers, Inc.*, C.A. No. C–143–WS–71 (M.D.N.C.), consent decree entered October 31, 1972... 2
*United States* v. *Roadway Express, Inc.*, C.A. No. C–68–321 (N.D. Ohio), consent decree entered September 1, 1970, partially reported at 2 EPD ¶10,295, p. 1176, affirmed, 457 F. 2d 854... 2

Statutes:

Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*... 1, 3, 9
Section 703(a)–(d), 42 U.S.C. 2000e–2 (a)–(d)... 16
Section 703(e)–(j), 42 U.S.C. 2000e–2 (e)–(j)... 16

Statutes—Continued
Page
Section 703(h), 42 U.S.C. 2000e–2(h) ..5, 7, 14, 15, 16, 17, 19, 20
Section 706(g), 42 U.S.C. (Supp. III) 2000e–5(g)..... 6, 10, 11, 14, 17, 23
Equal Employment Opportunity Act of 1972, 86 Stat. 103, 107..... 10
National Labor Relations Act, Section 10(c), 29 U.S.C. 160(c)..... 13, 14
42 U.S.C. 1981..... 3, 17
Miscellaneous:
Advisory Committee Notes to Rule 23(b)(2), Federal Rules of Civil Procedure..... 8, 21
110 Cong. Rec. 6549 (1964)..... 14
110 Cong. Rec. 7206–7207 (1964)..... 18
110 Cong. Rec. 7212–7215 (1964)..... 18
118 Cong. Rec. 7166–7169 (1972)..... 11
118 Cong. Rec. 7168 (1972)..... 11, 12, 13, 22
118 Cong. Rec. 7563–7567 (1972)..... 11
118 Cong. Rec. 7565 (1972)..... 11, 12, 13, 22
Federal Rules of Civil Procedure, Rule 23(b)(2)..... 8, 20

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## BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

### QUESTION PRESENTED

Whether a district court, in fashioning a remedy under Title VII of the Civil Rights Act of 1964 for racially discriminatory refusals to hire, is precluded from granting seniority credit to qualified persons who were illegally denied employment because of their race.

### INTEREST OF THE AMICI CURIAE

The United States and the Equal Employment Opportunity Commission are responsible for enforcing Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which

prohibits discriminatory employment practices. Consistent with that responsibility, we filed a memorandum in this Court in support of the petition for a writ of certiorari in this case. We have recently expressed the government's views on the question of awarding back pay under Title VII to members of an identifiable class of persons who have suffered economic injury because of racially discriminatory employment practices. See Brief for the United States and the EEOC as *Amici Curiae* in *Albemarle Paper Company* v. *Moody*, No. 74–389, and *Halifax Local No. 425, United Papermakers and Paperworkers* v. *Moody*, No. 74–428, this Term. Relief in the form of retroactive seniority for identified victims of employment discrimination has been included in consent decrees negotiated by the Department of Justice under Title VII.[1]

In its interpretation of Title VII, the decision of the court of appeals in the present case would restrict the scope of relief that may be fashioned by district courts to remedy unlawful refusals to hire on the basis of race. The case thus directly affects the government's enforcement responsibilities.

[1] See, *e.g.*, *United States* v. *Roadway Express, Inc.*, C.A. No. C–68–321 (N.D. Ohio) (consent decree entered September 1, 1970, partially reported at 2 EPD ¶ 10,295, p. 1176), affirmed, 457 F. 2d 854 (C.A. 6); *United States* v. *Navajo Freight Lines, Inc.*, C.A. No. 72–116–MML (C.D. Cal.) (supplemental order to consent decree entered January 15, 1973); *United States* v. *Pilot Freight Carriers, Inc.*, C.A. No. C–143–WS–71 (M.D. N.C.) (consent decree entered October 31, 1972). See also *United States* v. *Georgia Power Co.*, 7 EPD ¶ 9167 (N.D. Ga.) (parties agreed to order on remand from 474 F. 2d 906 (C.A. 5)).



## STATEMENT

This class action was brought by petitioners in the United States District Court for the Northern District of Georgia.[2] The complaints alleged that respondents (an interstate trucking company, a local union representing employees at the company's Atlanta terminal, and the international union) engaged in racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981. They sought an injunction against the continuation of those practices and other relief, including individual compensatory back pay and seniority credit (App. 11a–12a, 17a).

1. After a trial, the district court found, with respect to the matters pertinent here, that the company followed an unlawful practice of excluding blacks from employment as over-the-road drivers on account of their race. Prior to 1970, the company "adopted an unwritten policy against hiring Blacks for [over-the-road driver] jobs" (Pet. App. A50). Thereafter, "the hiring of Black road drivers was 'put off as long as could' by the company" (*ibid.*). Although several black applicants were hired for such jobs starting in 1970 (*ibid.*), other apparently qualified and experienced black applicants, who "were entitled to consideration for employment at the time," "were told there were no openings when in fact there were" (*ibid.*). The court accordingly found that black applicants

[2] Petitioner Franks filed his complaint on May 5, 1971; petitioner Lee moved to intervene as a plaintiff and filed his complaint on July 21, 1971 (App. 1a).

were "effectively denied employment as over-the-road drivers prior to January 1, 1972" (*id.* at A67).

The court enjoined further discrimination in violation of Title VII of the Act, ordered the company to notify each black applicant who had been rejected prior to January 1972 that he will be considered for employment if he indicates interest within 30 days of the notice, and directed that such persons who do indicate interest "shall be afforded priority in consideration over all other applicants until each such applicant, in chronological order, has been accepted or rejected by the company" (*id.* at A67).

The court declined, however, to require that non-named but identifiable members of the affected class be given back-pay awards or retroactive seniority credit when hired (*id.* at A53–A54).[2] "[S]uch relief,"

[2] The collective bargaining agreements in effect between the company and the union during the relevant period attach importance to an employee's seniority for several purposes. Under the August 1970 agreement (reproduced in part at App. 48a–51a), seniority controls (1) selection from among applicants who have bid on job vacancies (Art. IV, ¶ 7; App. 49a–50a); (2) the length of paid vacations (Art. VI, ¶ 1; App. 51a) and, to some extent, the scheduling of such vacations (Art. VI, ¶ 4; R. 574); (3) the order of lay-off and recall (Art. IV, ¶ 5; App. 49a); and (4) the accumulation of payments into the pension fund by the employer on the employee's behalf (Art. X; R. 577).

The relief characterized by the term "retroactive seniority" would afford to persons hired under the district court's order the seniority they would have had if the company had not originally denied them a road driver's job on the basis of race. The seniority date would be fixed at a point earlier than the date on which they are actually hired: for example, the date when they would have been hired but for the unlawful discrimination.



it held, "is not warranted in class actions," because it "presuppose[s] a vacancy, qualification, and performance by every member" and because it would "bypass the statutory administrative prerequisites to personal suit established by the Congress and any appropriate statute of limitations" (*id.* at A54). "For these reasons, as well as in the exercise of discretion," the court rejected those forms of relief (*ibid.*).

2. The court of appeals reversed the district court's denial of back pay to non-named class members (*id.* at A37–A40) but affirmed its denial of retroactive seniority credit (*id.* at A29–A31). The court of appeals held that relief in the nature of seniority credit, requiring the creation of "constructive seniority for applicants who have never worked for the company" (*id.* at A30), is prohibited by Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(h), which provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * *."

"The discrimination which has taken place in a refusal to hire," the court of appeals stated, "does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as 'not an unlawful employment practice'" (Pet. App. A30).

579-037—75——2

## SUMMARY OF ARGUMENT

### I

A. When a district court finds that an employer has intentionally engaged in unlawful employment practices under Title VII, it may "order such affirmative action as may be appropriate, which may include * * * any * * * equitable relief as the court deems appropriate" (42 U.S.C. (Supp. III) 2000e–5(*g*)). That broad remedial authority reflects a clearly expressed legislative purpose to eradicate the effects of past unlawful employment discrimination by restoring the identifiable victims of the discrimination as far as possible to the position they would have been in but for the discrimination. The courts are authorized to fashion the most complete relief possible in order to effectuate that purpose.

The most complete relief possible to remedy racially discriminatory refusals to hire includes not only requiring the employer to give the victims of the discrimination priority in filling new vacancies, together with back pay to compensate them for the financial injury they have suffered in the interim, but also awarding them seniority credit from the date they would have been hired were it not for the unlawful discrimination. In the absence of such seniority credit, the victims would not be made whole, since their lower seniority status would permanently subordinate them—for purposes of job security and important fringe benefits—to employees who were hired in their place. The district court has authority to award seniority credit in order to ensure that the victims will



not continue to suffer injury in the future as a consequence of the employer's initial refusal to hire them on account of their race.

B. Section 703(h) of the Act—which provides that differences in the terms and conditions of employment, if applied pursuant to a *bona fide* seniority system, are not unlawful unless they are the result of an intention to discriminate on the basis of race—is not a bar to seniority relief. Where such differences are applied through a seniority system that disfavors the identified victims of past (post-Act) discrimination, they *are* the result of an intention to discriminate on the basis of race.

Moreover, Section 703(h) addresses only what constitutes an unlawful employment practice; it does not purport to limit the court's remedial power to prescribe effective relief once a violation is established. The relief sought here would not alter the company's existing seniority system. It would merely restore the qualified members of the affected class of discriminatees to their rightful place within that system.

The legislative history of the Act reflects an intention to avoid requiring employers to remedy pre-Act racial discrimination in hiring by giving special seniority rights to different members of the disfavored racial group who may be hired after the Act is in effect. But the members of petitioners' class in this case were unlawfully denied employment *after* the Act took effect, and the relief sought would apply only to identifiable persons who were actually discriminated against by the employer. It would not involve preferential treatment on the basis of race.

C. Seniority relief may properly be awarded to members of petitioners' class regardless of whether each member filed an administrative charge with the Equal Employment Opportunity Commission. There is no reason to require the filing of numerous identical charges when a single charge by the class representative satisfies the purpose of Title VII's notice and conciliation requirements. Congress considered and rejected such a requirement when it enacted the 1972 amendments to the Act.

Nor does Rule 23(b)(2) of the Federal Rules of Civil Procedure preclude seniority relief to the class. That relief would be injunctive in nature. In any event, even to the extent that compensatory seniority relief resembles back pay, the relief sought in this class action does not relate "exclusively or predominantly to money damages" (Advisory Committee Notes to Rule 23(b)(2)).

II

The denial of seniority relief in this case was not a proper exercise of the district court's remedial discretion. That discretion must be exercised in a manner that effectuates the Act's remedial policy of making the victims of unlawful discrimination whole as far as possible. Ordinarily, therefore, a district court should award seniority credit to the identifiable victims of unlawful employment discrimination unless, for some articulated reason consistent with the Act's policy, the court finds that such an award would be unnecessary, inappropriate, or impracticable.



The reasons given by the district court in this case do not justify denying the requested relief. Contrary to the district court's view, there is no need for each member of the affected class to file individual charges with EEOC. Nor should it be an obstacle to effective relief that the record does not yet contain detailed evidence with respect to the circumstances in which each member of the class was refused employment. That evidence can be presented only after the members of the class have been identified. That some members may be entitled to no seniority credit does not mean that the entire class should be given less than adequate relief.

## ARGUMENT

### I

### UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, DISTRICT COURTS HAVE POWER TO AWARD RETROACTIVE SENIORITY CREDIT TO THE IDENTIFIABLE VICTIMS OF UNLAWFUL HIRING DISCRIMINATION IN ORDER TO RESTORE THEM TO THE SITUATION THEY WOULD HAVE BEEN IN BUT FOR THE DISCRIMINATION

#### *A. The remedial policy of the Act—to remedy the effects of past employment discrimination by making the victims whole as far as possible—comprehends awards of retroactive seniority to qualified persons who were wrongfully denied employment on account of their race*

The district court found that the company engaged in unlawful discriminatory employment practices by refusing to hire apparently qualified black applicants for over-the-road driver positions on account of their

race. The court was therefore authorized under Section 706(g) of the Act, as amended, 42 U.S.C. (Supp. III) 2000e–5(g), to enjoin the unlawful practices and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate."

The broad remedial authority thus invested in the district court reflects a congressional policy, not only to eliminate discriminatory employment practices, but also to eradicate the effects of past unlawful discrimination by restoring the identifiable victims of the discrimination as far as possible to the situation they would have been in but for the discrimination. "The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it" (*Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7)).[4]

This "make whole" purpose of Title VII is confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 107, which amended Section 706(g) to make explicit that

[4] See also *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90, 96 (C.A. 3); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 804 (C.A. 4); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 252 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375 (C.A. 5); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 921 (C.A. 5); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876 (C.A. 6); *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1202 (C.A. 7), certiorari denied, 404 U.S. 991.



the district court's remedial authority is not limited to reinstatement or hiring with back pay but also includes "any other equitable relief as the court deems appropriate." The Section-by-Section Analysis of the 1972 Act, presented to the House and the Senate at the time the Conference Report on the Act was submitted to each body (118 Cong. Rec. 7166–7169, 7563–7567 (1972)), states with respect to Section 706(g) (*id.* at 7168, 7565; emphasis added):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*

The power of the district court under Title VII "to fashion the most complete relief possible * * * to make the victims of unlawful discrimination whole" (*ibid.*) is not unique. It is "the historic power of equity to provide complete relief in light of the statutory purposes" (*Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292). A court of equity may "give whatever * * * relief may be necessary

under the circumstances" in order to "do complete rather than truncated justice" (*Porter* v. *Warner Holding Co.,* 328 U.S. 395, 398). Particularly in the enforcement of the civil rights statutes, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*Louisiana* v. *United States,* 380 U.S. 145, 154).

In fashioning an effective remedy upon a finding of unlawful hiring discrimination under Title VII, the district court has the power, not only to enjoin future violations (which would eliminate the discriminatory practices prospectively) and to award back pay (which would compensate the victims for the financial injury they have already suffered), but also to award retroactive seniority credit to ensure that the identifiable victims of the wrongful refusals to hire are truly "restored to a position where they would have been were it not for the unlawful discrimination" (Section-by-Section Analysis, *supra,* 118 Cong. Rec. 7168, 7565). An employee's seniority, in the context of the existing collective bargaining agreement, determines his competitive position in bidding on job vacancies, his susceptibility to layoff and recall, and the nature and extent of important fringe benefits (see note 3, *supra*). As this Court has stated, "[s]eniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job" (*Humphrey* v. *Moore,* 375 U.S. 335, 346–347).



If the company had not engaged in unlawful hiring discrimination prior to 1972, qualified black applicants for over-the-road driver jobs would have been employed in those jobs years ago and would today have accumulated substantial seniority. Merely hiring the identified victims of that discrimination without affording them the seniority credit they could reasonably be expected to have accumulated is less than "the most complete relief possible" (Section-by-Section Analysis, *supra,* 118 Cong. Rec. 7168, 7565).

In the absence of appropriate seniority credit, a newly hired black driver whose application was unlawfully rejected by the company in 1970 because of his race would be permanently disfavored with respect to the terms and conditions of his employment, because his seniority status would be forever subordinated to the seniority status of the driver hired in his place and of those thereafter hired prior to his own belated hiring. The result would be a perpetuation of the effects of the company's discriminatory refusal to hire him in 1970. An award of back pay would compensate him for the financial injury he may have suffered between 1970 and the date of his employment with the company, but it would not eliminate the financial and other injury he will suffer in the future as a result of the company's initial racially discriminatory refusal to hire him. Cf. *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505, 513–514 (E.D. Va.).

The National Labor Relations Board has interpreted Section 10(c) of the National Labor Relations

579-037—75——3

Act, 29 U.S.C. 160(c)[5]—the model for Section 706(g) of the Civil Rights Act of 1964[6]—to authorize an award of retroactive seniority as a remedy for unlawful refusals to hire because of union activity. It is appropriate in such circumstances, the Board has ruled, to require the employer "to credit all these employees with such seniority and other rights and privileges that would have accrued to them as of the dates when they would have been hired, absent the discrimination against them." *Atlantic Maintenance Co.*, 134 NLRB 1328, 1336, enforced, 305 F. 2d 604 (C.A. 3); see also *Southern Electrical & Pipefitting Corp.*, 131 NLRB 44; *Lamar Creamery Co.*, 115 NLRB 1113, enforced, 246 F. 2d 8 (C.A. 5).

The district court's power under Section 706(g) of Title VII to grant "the most complete relief possible" (Section-by-Section Analysis, *supra*) similarly comprehends the authority to award retroactive seniority credit in appropriate cases.

### *B. Section 703(h) of the Act is not a bar to an award of seniority credit*

The court of appeals correctly recognized that "the purpose of Title VII * * * is to make the discrimina-

[5] Section 10(c) authorizes the Board, upon a finding that a person engaged in an unfair labor practice, to issue a cease and desist order and to require the person "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *."

[6] See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 921, n. 19 (C.A. 5); 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey).



tee whole and to remedy the effects of past discrimination" (Pet. App. A23). It nevertheless affirmed the district court's denial of seniority credit relief, because it concluded that such relief is barred by Section 703(h) of the Act, 42 U.S.C. 2000e–2(h). That section provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *."

None of the parties in this Court defends the court of appeals' holding on this point,[7] and we believe it is plainly incorrect. See *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038 (C.A. 3), vacated and remanded on other grounds, 414 U.S. 970; *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (C.A. 6), pending on petition for a writ of certiorari *sub nom. Local 862, International Union, United Automobile Workers* v. *Ford Motor Co.*, No. 74–1349.

First, the company's seniority system, as it affects the class of black over-the-road drivers who were previously denied employment because of their race, is not protected by Section 703(h). The proviso to that

[7] The company, in its brief in opposition to the petition for a writ of certiorari, "conceded that the view of the Fifth Circuit may be incorrect concerning the effect of section 703(h) upon the seniority remedy sought by petitioners" (p. 3). The union, in its response to the petition, similarly expressed "real doubts as to the correctness of the decision below" (p. 4).

section limits its protection to seniority systems in which the differences in terms and conditions of employment "are not the result of an intention to discriminate because of race * * *." Where those differences are applied to the disadvantage of newly hired persons who are the identified victims of a prior unlawful refusal to hire, the differences *are* "the result of an intention to discriminate because of race." Were it not for the prior unlawful discrimination, the newly hired discriminatees would have accumulated substantial seniority credit and would have enjoyed the full benefits of that seniority. The differences between the seniority benefits to which they would have been entitled in the absence of the company's unlawful conduct and the seniority benefits to which they will be entitled when they are finally hired are differences that result directly from discrimination on the basis of race.

Second, and more fundamentally, Section 703(h) addresses only what constitutes an unlawful employment practice. It does not purport to limit the district court's broad remedial power to prescribe effective relief once a violation is established. Subsections (a) through (d) of Section 703 specify the employment practices that are made unlawful by Title VII; subsections (e) through (j) exempt certain practices from the range of possible violations. Thus, subsection (h) provides that applying different conditions of employment pursuant to a *bona fide* seniority system "shall not be an unlawful employment practice."

Neither on its face nor when read in the context



of the other sections of Title VII does Section 703 circumscribe the district court's authority under Section 706(g) to fashion the most effective relief possible upon a finding that unlawful employment practices have been committed. That a particular employment practice is not by itself unlawful under Title VII does not mean that it is beyond the remedial reach of the district court. Modification or even elimination of an otherwise lawful practice may be necessary in certain circumstances to provide effective relief from a practice that is unlawful. Thus, even if, as the court of appeals held, the company's seniority system in this case falls within the Section 703(h) exemption and therefore is not itself an unlawful employment practice, that does not insulate the system from remedial adjustments that are reasonably necessary to eradicate the effects of prior unlawful refusals to hire.[8]

Moreover, the seniority credit relief sought on behalf of the class here requires neither a modification nor an elimination of the existing seniority system. It would merely give the qualified members of the class their rightful place within that system by calculating their seniority from the date they would have been hired were it not for the company's unlawful racial discrimination.

[8] Petitioners also argue that Section 703(h) would not in any event affect the district court's authority to grant retroactive seniority pursuant to their cause of action under 42 U.S.C. 1981. Since in our view Section 703(h) does not prevent the granting of the relief requested under Title VII, we believe the Court need not reach any issue under Section 1981.

The legislative history of Title VII reflects no congressional purpose to prohibit an award of retroactive seniority credit to identifiable victims of post-Act hiring discrimination. It does reflect an intention to protect seniority lists in effect at the time the Act took effect and to free employers who engaged in pre-Act racial discrimination from any obligation to give special seniority rights to blacks hired after the Act.[9]

Here, however, the affected class of black applicants were discriminatorily denied employment *after* the Act became effective, and the relief sought would not disrupt any seniority list in effect on the Act's effective date. It would make adjustments in the post-Act seniority list because that list is a product of employment practices made unlawful under the Act. The requested relief would inure only to the benefit of the specific, identifiable individuals who were previously denied employment by the company because of their race.

It follows that the court of appeals' reliance here on the dicta in its prior decision in *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980, was inappropriate. The court in *Local 189* held unlawful a department seniority system that perpetuated the effects of past racial discrimination by

[9] See the Department of Justice and Clark-Case interpretative memoranda placed in the record by Senator Clark (110 Cong. Rec. 7206–7207, 7212–7215 (1964)), the pertinent portions of which are reproduced in the Brief for Petitioners (pp. 25–26, nn. 34 and 35).



limiting the access of black employees to formerly white jobs. In rejecting an argument that the department seniority system was protected by Section 703 (h), the court distinguished the situation before it from a situation in which black employees hired after the Act's effective date would be given preferential seniority treatment because of the employer's pre-Act discrimination. The court stated with respect to the latter situation (416 F. 2d at 995):

> [R]equiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race. * * *

The court's comments are not at all applicable to the present case, where seniority credit is sought on behalf of actual, identifiable victims of post-Act hiring discrimination. Such relief in the context of the facts here would plainly be remedial and not "preferential" (as that term was used in *Local 189*).

*C. Retroactive seniority may properly be awarded to class members who previously were denied employment on account of their race, whether or not they filed individual charges with the Equal Employment Opportunity Commission.*

The company's Brief in Opposition to the petition for a writ of certiorari argues that, while Section 703(h) does not bar seniority credit relief for individual plaintiffs, "the seniority remedy * * * is not appropriate in a Rule 23(b)(2) class action" and, in any event, "is not available to class members with respect to whom a charge has not been filed under Title VII with the EEOC" (Br. in Opp. 6). Neither contention is substantial. Both were correctly rejected by the court of appeals (Pet. App. A37–A40), albeit in connection with the back pay issue.

Rule 23(b)(2) of the Federal Rules of Civil Procedure applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *." The function of the rule is not to restrict the relief available in a class action but to establish the circumstances in which it is proper to maintain a class action. The proper inquiry, therefore, is not whether seniority credit relief can be granted under the rule to members of a class, but whether it is permissible to maintain a Rule 23(b)(2) class action when seniority credit relief is requested.

The answer to that question is clear. The seniority credit relief sought in this case is injunctive in nature



and would be applicable to the class as a whole. Thus, even if that were the *only* relief sought, a class action would be appropriate. Here, however, petitioners also sought an injunction against the continuation of allegedly unlawful employment practices that plainly affected the entire class as a group.

Therefore, even if the individual compensatory nature of seniority credit relief somehow alters its injunctive nature, so that it is similar to an award of back pay, that would not affect the propriety of the class action here. The Advisory Committee Notes to subsection (b)(2) of Rule 23 state that it "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages" (emphasis added). What the court of appeals said in this context with respect to the back pay issue is equally applicable to the seniority issue (Pet. App. A39):

> [T]his Title VII action cannot be characterized as one seeking "exclusively or predominantly money damages." * * * [B]ack pay awards under Title VII * * * are not damages, as such, but an integral part of the equitable remedy. Even if back pay is considered as equivalent to damages under Rule 23, in this case back pay is not the exclusive or predominant remedy sought.

The company's other contention—that seniority credit relief should not be granted to class members who did not file individual charges with EEOC—was also correctly answered by the court of appeals in the context of the back-pay issue (Pet. App. A38–A39).

We addressed a similar contention with respect to back-pay relief in our *amicus* brief in *Albemarle Paper Co.* v. *Moody,* Nos. 74–389 and 74–428 (pp. 31–33).[10]

We rely here on the court of appeals' opinion and the discussion in our brief in *Albemarle.* As the court of appeals stated, "[a]n EEOC complaint filed by the class representative allows an adequate opportunity for resolution of problems of the class through conciliation, * * * and opens the courthouse doors for the class" (Pet. App. A38). Congress explicitly rejected in the 1972 Act the limitation on class action relief that the company now seeks from this Court. The Section-by-Section Analysis, *supra,* stated: "[T]he leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House Bill and specifically rejected by the Conference Committee" (118 Cong. Rec. 7168, 7565 (1972)).

## II

### THE DENIAL OF SENIORITY CREDIT IN THIS CASE CANNOT BE SUSTAINED AS A PROPER EXERCISE OF THE DISTRICT COURT'S REMEDIAL DISCRETION

As we view this case, the sole question presented is whether the district court is prohibited from awarding

[10] We have furnished copies of our brief in that case to counsel for the parties in this case.



retroactive seniority credit as a remedy for discriminatory hiring practices in violation of Title VII. In its Brief in Opposition to the petition for a writ of certiorari, however, the company—while conceding (p. 4) that an award of retroactive seniority is properly within the scope of the district court's remedial discretion under Section 706(g)[11]—argued that "[t]he district judge exercised his discretion in the present case, and the Court of Appeals found no abuse of discretion" (*ibid.*).

Both statements are literally accurate, but neither can support the judgment below. While the district court purported to rest its denial of seniority credit relief upon an "exercise of discretion" (Pet. App. A54), it gave no sufficient reason to justify its refusal to grant the requested relief. And, having held that the district court was barred from awarding seniority credit—*i.e.,* that it had no discretion in the matter, the court of appeals had no reason to consider whether the district court abused the discretion it did not have.

We have already shown that the district court *does* have discretion to grant such relief. Was its refusal to do so here a proper exercise of that discretion? We think not.

To say that a matter is within a court's discretion means, in the words of Chief Justice Marshall, that it

[11] That concession, however, is qualified by the company's contention, discussed above, that such relief may not properly be granted to other than the named plaintiffs in this case.

is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles" (*United States* v. *Burr,* 25 Fed. Cas. 30, 35). In the enforcement of a statutory scheme, the courts must exercise their discretion "in light of the large objectives of the Act"; their discretionary remedial determinations must "reflect an acute awareness" of the congressional policy (*Hecht Co.* v. *Bowles,* 321 U.S. 321, 331).

In the context of Title VII, that policy, as we have indicated, is to grant the most complete relief possible in order to end the unlawful discrimination and make the victims of that discrimination whole. It follows that the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*Louisiana* v. *United States, supra,* 380 U.S. at 154). As the court of appeals in this case correctly stated, "[i]f an appellate court can determine from the record that the relief granted is not sufficient to make the discriminatee whole as far as possible, then the district court's order falls outside the bounds of its discretion" (Pet. App. A23–A24).

As we have stated (pp. 12–13, *supra*), hiring priority and back pay awards for those who were previously denied employment on account of their race are not the most complete relief possible. It leaves those persons permanently subordinated in terms of seniority to the white employees who were hired in their place and fails to restore them to the position they would have been in but for the company's unlawful discrimination.



In our view, therefore, the proper standard here is similar to the standard we proposed in *Albemarle* for the awarding of back pay relief: the district courts should ordinarily award seniority credit to the identifiable victims of unlawful employment discrimination, unless there are substantial countervailing considerations that make such an award unnecessary, inappropriate, or impracticable. The district court should articulate its reasons for denying such relief, and those reasons should be carefully scrutinized by the appellate courts to ensure that they are consonant with the purposes of the Act and that the district court has fashioned the fullest possible relief consistent with fairness. Cf. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400.

We recognize that the burdens of seniority relief fall in part upon innocent workers whose existing job security and expectations may be diluted as a consequence of such relief to the victims of the company's discriminatory practices.[12] To a certain extent, how-

[12] That would be true, of course, only with respect to those seniority benefits that are competitive in nature, such as job-bidding and order of layoff. It would not be true with respect to such fringe benefits as vacation time and pension fund payments, which are also determined on the basis of seniority. As the union stated in its response to the petition for a writ of certiorari, "[t]here is no statutory policy which even arguably precludes retroactive investment of length of service for fringe benefit computation purposes" (p. 6). See *Meadows* v. *Ford Motor Co., supra,* 510 F. 2d at 949. Indeed, in many contexts an award of back pay would be an incomplete remedy even for past financial loss if it were not supplemented with an award of seniority credit for fringe benefit purposes.

ever, those expectations are themselves the fruit of the company's unlawful discrimination. Were it not for the company's practice of denying employment on the basis of race, some existing employees might never have been hired and others might not have advanced to their current relative seniority position. Thus, as the Second Circuit stated in *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 663:

> Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification. * * * If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

There may be circumstances, of course, in which an award of full seniority credit should be deferred until completion of a training or apprenticeship program. Practical considerations of this kind should properly be taken into account by the district court in fashioning a decree.[13]

Finally, where seniority credit is for some reason an inappropriate or unworkable remedy (as, for example, where the victim of discrimination is unlikely to be hired at all because no vacancy is likely to occur), the district court should consider alternative

[13] Though the record in the present case may not be complete in this respect, we are unaware of any practical obstacle to the awarding of full seniority credit to petitioners' class.



forms of relief. One such alternative, suggested by the union's response to the petition for a writ of certiorari in this case, is "front pay"—that is, a money award designed to compensate the newly hired discriminatee for the injury that he will suffer in the future as a consequence of his later seniority date. We do not view front pay as an adequate substitute for seniority credit, because some important benefits attached to higher seniority cannot adequately be compensated for in money. In an appropriate case, however, front pay may constitute the most complete relief possible.

The district court in the present case stated two reasons for denying seniority credit to members of petitioners' class. One was that the class members had not filed individual administrative charges with EEOC. As we stated above, that is not a proper reason for denying relief to the class.

The other reason was that "[t]he claims for retroactive seniority * * * presuppose a vacancy, qualification, and performance by every member" of the class, and "[t]here is no evidence on which to base these multiple conclusions" (Pet. App. A54). But that is not a reason to deny effective relief. The qualifications of each person who was denied employment because of his race, and the question whether he would have been hired to fill a vacancy in the absence of discrimination, are issues to be resolved by the court after it has determined that relief is appropriate and after all members of the class who now wish to be considered for employment have been identified. Indeed, essentially the same questions are to be resolved by the district court in this case under the court of appeals'

remand order (see Pet. App. A39–A40). If the evidence shows that a particular applicant is unqualified or that for other reasons he would not have been hired even in the absence of the company's unlawful discrimination, then he would not be entitled to the relief. Although it is probably impossible to determine now what a qualified applicant's job performance would have been had he been hired initially, that impossibility is a result of the company's wrongdoing and should not be a reason for denying the applicant complete relief.

It may be that on remand the evidence will show some other reason, consistent with the Act's purposes and with the principles we have suggested, for denying seniority credit relief. No such reason appears on the present record.



## CONCLUSION

Insofar as it affirmed the denial of retroactive seniority relief to the members of petitioners' class, the judgment of the court of appeals should be vacated and the case should be remanded to that court with directions that it be remanded to the district court for further consideration of retroactive seniority relief in accordance with the proper remedial standard.

Respectfully submitted.

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